COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
S-15,449

Commonwealth of Massachusetts

v.

Robert E. O'Neal

AMICUS CURIAE BRIEF

OF THE BOSTON BAR ASSOCIATION

5/20/75

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:
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INTEREST OF THE AMICUS

The Boston Bar Association is responding to the invitation of the Court for submission of amici curiae briefs by responsible parties on the application of the compelling state interest and least restrictive means tests to the imposition of the death penalty in rape-murder cases. The brief is submitted on the authority of a vote of the Council, the governing body of the Boston Bar Association. It is in the tradition of this Association to contribute responsibly to the articulation and development of legal doctrine on issues of public concern.

ARGUMENT

The Commonwealth has a compelling state interest in protecting its citizens from the violent destruction of rape-murder. Deterrence of such offenses and prevention of their recurrence are vital concerns of any society worthy of the name.

But there are alternative, less drastic means available for achieving the Commonwealth's goals. Life or long imprisonment both deter the potential offender and isolate the actual offender from the rest of society, protecting society from him.

Deterrence can more readily be achieved by a potential offender's belief in the relative certainty of prompt apprehension and sentencing, than by a fear of an infrequent imposition of an ultimate penalty in a few cases. Furman v. Georgia, 408 U. S. 238, 302 (1972) (Brennan, J. concurring).

Rape-murder, involving twisted and warped sexual and psychotic passions, is an unlikely crime to be prevented by a rational calculation of relative possible punishments. For this reason, if a mandatory death penalty is to be imposed at all, rape-murder is an inappropriate crime for deterrent effect.

Analysis of the House and Senate Journals for 1951 justifies the conclusion that retention of a mandatory death penalty for rape-murder was an accidental by-product of an intense parliamentary battle between opponents and proponents of capital punishment. The bill giving clemency discretion to juries was amended, after it had passed the House and been ordered to a third reading in the Senate, to exclude the clemency option

in cases of rape-murder. The amendment carried by one vote. The author of the amendment voted against the bill as finally enacted. Amendment seeking other exclusions failed. See Journal of the Senate, pps. 608-612, March 21, 1951; Stat. 1951, c. 203.

The legislature has taken account of the special psychological genesis of the conduct of at least a significant number of rapists and the non-applicability of the felt deterrent effect of our regular criminal sanctions. G. L. c. 123A.

Indeed, the twisted mind of a rape-murderer might even use the offense as a means of seeking out death for himself as an end to his evil life, a form of suicide with the assistance of the state. Cf. Black, Capital Punishment: The Inevitability of Caprice and Mistake 26-27 (1974). Or, the sensationalism of a capital trial may lead a warped mind to commit a like offense for the sake of all that attention. Camus, Reflections on the Guillotine, in Resistance, Rebellion and Death 131, 145 (1960).

The purpose of protection of society from a repetition of the offense is as well served by life or long imprisonment as by the more drastic means of execution. A consideration of expense to the state is not a worthy means for deciding such a solemn question. However,

it has been stated that capital punishment is more expensive to the state in dollars and cents terms, even apart from the destruction of human values involved. Furman v. Georgia, 408 U. S. 238, 357-358 (Marshall, J., concurring).

Execution is an excessive penalty, less drastic means being available to achieve the Commonwealth's objectives. Some cities in Imperial China used to deter traffic offenses by beheading occasional offenders and exhibiting their heads in wicker baskets suspended at the intersections. No doubt there was a deterrent effect; certainly there was no recidivism by the punished offender. But the practice was excessive and barbarous.

At least two Justices of the Supreme Court of the United States have concluded that less drastic means than capital punishment are available for deterrence and for elimination of recidivism. Long imprisonment serves these objectives at least as well if not better. Furman v. Georgia, 408 U. S. 238, 300-305 (Brennan, J., concurring) and 345-359 (Marshall, J., concurring) (1972). Their analysis is in terms of the cruel and unusual punishment test of the 8th amendment, but their reasoning, their statistics and their citations apply equally well to the fundamental rights analysis test of substantive due process.

The Court must strictly scrutinize the destruction of the most fundamental of all rights, that of life itself. It is the position of the Boston Bar Association as amicus curiae that the Commonwealth has not carried and can not carry its burden of showing that execution is the least restrictive means available for effecting its valid objectives.

The Boston Bar Association further submits that (1) mistake is possible at many stages of the adjudicatory process, with posthumous pardon an inadequate remedy for mortal fallibility, (2) that discretion is possible at many stages of the process with the result that actual imposition of the penalty has essential elements of caprice, falling most heavily on the poor, the hated minorities, and the disadvantaged, and (3) that the process of taking a life by the state is degrading and destructive to the entire society.

The analysis set forth above in the opinion of the amicus applies equally as well to the cruel and unusual punishment tests under Article 26 of the Declaration of Rights of the Massachusetts constitution and of Article Eight of the Amendments to the United States Constitution. Those tests are not historic only, but grow to meet the evolving standards of decency that mark the progress of a maturing society. Trop v. Dulles,

356 U. S. 86, 101 (1958). Just as the once accepted punishment of death without benefit of clergy for embezzling bank funds (St. 1781, c. 34) would long since have been regarded as cruel and unusual, so now the death penalty for rape-murder is cruel and unusual. It is excessive in the presence of less drastic alternatives for the achievement of the Commonwealth's objectives.

CONCLUSION

For the reasons set forth above the Boston Bar Association as amicus curiae respectfully urges that the statutorily mandated sentence of death upon the defendant Robert E. O'Neal be vacated.

Respectfully submitted,

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